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No. 101.—OCTOBER TERM, 1902.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

against

THE BOROUGH OF NEWHOPE,
Defendant in Error.

Petition and Argument for Rehearing.

SILAS W. PETTIT,
RUSH TAGGART,
HENRY D. ESTABROOK,
For Plaintiff in Error.

JOHN F. DILLON,
Of Counsel.

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Supreme Court

OF THE UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY,
Plaintiff in Error,

vs.

THE BOROUGH OF NEWHOPE,
Defendant in Error.

October Term, 1902.
Number 101.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

Petition and Argument for Rehearing.

The Western Union Telegraph Company, plaintiff in error, respectfully petitions for a rehearing in the above cause, and assigns as reasons therefor:

FIRST. The Court erred in assuming that the ordinance of the Borough of Newhope was enacted by said borough as a police regulation merely, with the sole intention and purpose of *reimbursing* said borough for the necessary expense incurred on behalf of plaintiff in error in the supervision and regulation of its poles and lines of telegraph in said borough; for that said ordinance in express terms purported to be and was in fact and in effect a tax levied upon telegraph, telephone and electric-light companies *for a privilege and*

authority to maintain their poles and wires in the Borough of Newhope.

SECOND. The Court erred in holding that such ordinance, or such of its terms as imposed a tax for a privilege and authority to maintain poles and electric wires in said Borough of Newhope, was a valid police and municipal regulation not amounting to a regulation of interstate commerce, particularly where applied to telegraph companies, such as plaintiff in error, that had accepted the burdens, restrictions and obligations of the Act of Congress, July 24, 1866.

THIRD. The Court erred in misapprehending the nature and extent of the propositions conceded by counsel for plaintiff in error in argument ; for that counsel did not wish nor expect to be understood as conceding any one of the following propositions : (1) The right of a municipality to tax by license ordinance a telegraph company that had accepted the burdens, restrictions and obligations of the Act of Congress, July 24, 1866 ; (2) nor the *prima facie* validity and reasonableness of the ordinance in question ; (3) nor that the *onus probandi* was on the person or company attacking the validity or reasonableness of such an ordinance. On the contrary, the plaintiff in error claims : (1) That no municipality has a right to tax or burden a telegraph company accepting the restrictions and obligations of the Act of Congress, July 24, 1866, except such tax be for revenue purposes on its actual property, in common with all citizens, the municipality being thereunto authorized by legislative enactment, or except the charges imposed be in the nature of rental for property of the City actually and exclusively appropriated by the telegraph company ; and that to permit every municipality in the United States, under

the guise of a license tax, to exact from a telegraph company, so peculiarly an agency of the Government and of interstate commerce, a sum of money *onerous in amount, and undefined or vague in purpose*, would be to restrict and even thwart the rights granted by the Congress of the United States under the act aforesaid; (2) that there is no presumption of reasonableness or validity attaching to an ordinance of a municipality, *the sole object of which is to obtain reimbursement for actual expenditure* (even if the ordinance in question could be so construed), and that both upon principle and the rules of evidence, the burden should be upon the municipality itself to justify its exaction; (3) that an ordinance which levies an annual tax of a dollar a pole to reimburse a municipality of one thousand inhabitants for expenditures to be incurred for an occasional inspection of such pole, when the pole so inspected costs not more than three dollars, is, on the face of it, unreasonable and unjust; and that an ordinance of a village which every year exacts two dollars and a half per mile for the inspection of a telegraph wire, without discriminating as to the size or material of the wire to be inspected, or the manner of its erection or maintenance, or the use of the same, or the quality of electric current carried thereon, or its relationship to other electric wires and the quality of current carried by them, is, on the face of it, unreasonable and unjust.

FOURTH. The Court, in referring to the case in 202 Pennsylvania, 532, erred in inferring that the case there considered was similar to the case at bar, inasmuch as the reasonableness of the ordinance was submitted to a jury in *Borough of Newhope vs. Postal Telegraph Cable Company* (202 Pa., 532), which jury returned a

verdict in favor of the borough FOR LESS THAN THE AMOUNT CALLED FOR BY THE ORDINANCE.

That a comparison of that case with the record in this will show that both cases were tried on the same day, before the same Court and the same panel of jurors, and for a similar cause of action; and that while in this case the ordinance of the borough was enforced, in the Postal Case there was a substitution of the discretion of the jury for that of the Burgesses. And plaintiff in error insists that an ordinance, levying any sort of tax, which, on its face or by judicial construction, is thus made to operate partially and unequally, as different juries may differently determine, is unreasonable and void.

FIFTH. The Court erred in approving generally the rules laid down by the State courts of Pennsylvania for determining the reasonableness or unreasonableness of a license tax ordinance; particularly so much of the doctrine of said State courts as allows compensation to the municipality *for the supposed dangers to, and possible liability of the municipality growing out of the negligent construction and maintenance of telegraphic poles and wires.* And in this behalf the petitioner shows unto this Honorable Court that if an ordinance, arbitrarily fixing the amount of a license tax, is to be taken as *prima facie* reasonable and just; if the elements determining the reasonableness of such ordinance shall be the expense of issuing licenses, inspection and surveillance not only, but also the payment of councilmen for all extra meetings they may choose to hold, as well as the insurance of the municipality against remote and speculative "liability imposed upon the city by the erection of telegraph poles;" then it must needs follow that every such ordinance, *imposing a tax in*

any amount whatsoever, will be declared just and reasonable by the courts BECAUSE THERE IS NO EVIDENCE POSSIBLE OR CONCEIVABLE TO NEGATIVE THE PRIMA FACIE PRESUMPTION OF REASONABLENESS GIVEN TO SUCH ORDINANCE. It would be vain for the licensee to show that during the current year the municipality had expended no amount of money whatever in the way of inspection or surveillance—*for that was done in this case;* or to show that during the entire life of the ordinance, say four or five years, the municipality had expended no amount whatever for such purposes, and that there had been no necessity for such expenditure—*for that was done in this case;* but, because, as stated in the case of *Chester City vs. Telegraph Company* (154 Pa., 464), *quoted with approval by this Court,* "The difficulty is it" (the evidence) "*does not go far enough.* It refers only to the *usual, ordinary or necessary expense of municipal officers, of issuing license and other expenses thereby imposed upon the municipality.* IT MAKES NO REFERENCE TO THE LIABILITY IMPOSED UPON THE CITY BY THE ERECTION OF TELEGRAPH POLES!"

Graft this doctrine upon the law of taxation—*establish by the pronouncement of this august tribunal the right of every municipality to provide an insurance fund against possible liability from the conduct of a lawful business out of that very business*—and you have created A NEW SPECIES OF TAXATION, so vague in purpose and impossible of definition, that all and all manner of ordinary taxation—state, federal and municipal, aggregated and combined—would soon seem insignificant.

Under the principle announced by this Honorable Court (approving as reasonable the ordinance here involved, as well as the impossible test imposed by the doctrine of the State courts of Pennsylvania for deter-

mining its *un*reasonableness), every village, hamlet, township, county, municipality and State in the Union has the right to impose a license tax upon your petitioner of one dollar per pole each year within their respective limits, and two dollars and a half per mile of wire each year, and that this is not an extreme case or a remote speculation, we, the accredited counsel in this case affirm (*dehors* the record, to be sure) that *the case at bar is only one of eight hundred claims now pending, involving ordinances of eight hundred different municipalities, all to the same purpose as the ordinances here involved.*

Furthermore, counsel with equal solemnity affirm that the published annual reports of the plaintiff in error show that it owns two hundred thousand miles of poles in the United States, there being on an average of about thirty-five poles to the mile; that it owns over one million miles of wire; and that if every pole erected by it, and every mile of wire maintained by it, should be taxed at the rate imposed by the Borough of Newhope—which, according to the census, has about one thousand inhabitants—the license tax which your petitioner would be required to pay each year would amount to nearly ten millions of dollars, or nearly one and a half times its entire net earnings.

WHEREFORE, your petitioner will ever pray, &c.

WESTERN UNION TEL. CO.

SILAS W. PETTIT,
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HENRY D. ESTABROOK,
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ARGUMENT.

It is true that counsel for your petitioner have read with considerable apprehension a recent contribution to one of our periodicals made by a member of this Court, who, after describing the painstaking consideration given to every cause presented to the Supreme Court of the United States, says :

" It is not strange, therefore, that when a case has passed through such handling, the opinions of the justices are quite firmly fixed ; and it is not often that they are convinced of error or mistake, and thus petitions for rehearing are seldom sustained."

And yet there have been occasions when the particular Justice, who made this statement, has had occasion to reconsider causes determined by him, and when no amount of painstaking consideration or pride of opinion has deterred the learned Justice from receding from a position which, on further argument, he has been convinced was untenable and unjust.

See, for instance, *East Omaha Land Company vs. Jeffries* (40 Fed. Rep., 386).

Despite the disheartening remark in the periodical referred to, therefore, we venture to hope that the petition for a rehearing in this case will be granted, basing that hope upon the conceded fallibility of every human tribunal, and the anxiety of this, the greatest of such tribunals, to correct an error, when convinced that error has been committed.

The petition for rehearing sets forth the specifications of errors complained of ; it is the purpose of this argument to somewhat elaborate them.

It is conceded that any tax upon interstate commerce, *as such*, is illegal and void.

It is conceded that the plaintiff in error, having accepted the burdens, restrictions and obligations of the Act of Congress, July 24, 1866, has the *right* to occupy with its poles and wires the streets of the Borough of Newhope, Pennyslvania, *so long as such occupation does not interfere with the ordinary travel upon said streets, and, if required, so long as it shall pay to the municipality or the state a just compensation for whatever property of the borough or state it may have exclusively appropriated* (St. Louis case, cited *post.*).

And it must also be conceded (inasmuch as petitioner's acceptance of the obligations and limitations of the Act of Congress referred to has made the Federal Government the potential owner of its lines of telegraph), that the petitioner is a somewhat extraordinary agency of interstate commerce and is, in theory and in fact, an agency of the Federal Government (Tel. Co. vs. Texas, 105 W. S.).

At all events, it is conceded that if the tax levied against the petitioner, under the ordinance of the Borough of Newhope complained of, is a tax on interstate commerce, as such, or on petitioner's right to occupy the streets of such borough under its federal franchise, then such tax is illegal, and the ordinance imposing it is nugatory and void. In other words, it is conceded that the petitioner may have paid to the State of Pennsylvania, and to the Borough of Newhope, its proportionate share of general taxes levied against its actual property; that it may have compensated the Borough of Newhope for whatever portion of its streets petitioner has exclusively appropriated and occupied; that it may have satisfied the State of Pennsylvania

and the Borough of Newhope, for whatever taxes have been levied as a license to do a purely intra-state business; *and that the particular tax, levied under the particular ordinance, is a tax different and additional to those enumerated.*

The Tax Under the Ordinance Complained of is a Tax on the Right or Authority to Maintain Telegraph Lines.

The ordinance itself says so.

The first section of the ordinance reads as follows (Record, p. 15, Ex. A): "Be it ordained and enacted by the Town Council of the Borough of Newhope, that before any telegraph, telephone or electric light poles shall be erected, or telegraph, telephone or electric light wires shall be run along, over or under any street, lane or alley of the Borough of Newhope, *permission to do so shall be first obtained from the Town Council* by the corporation, firm or individual who proposes to erect such poles and run such wires, *such permission to be granted by ordinance only.*

The material portion of Section 2 reads as follows:

"On or before the first day of October next, *and annually thereafter*, such owner or lessee shall make application to the Burgess for *a license to maintain* the poles and wires theretofore erected for the ensuing year, specifying the poles by their designation of name or initials and number, as provided by this section, and wires by the streets along, over or under which they run. The Burgess shall, upon the production to him, by the applicant, of the receipt of the borough treasurer for the license fees hereinafter provided for, issue a license, *which shall authorize the maintenance of the*

poles and wires designated in the application, for the period of one year from that date.

Section 3 of the ordinance reads as follows:

"That *for the maintenance* of each and every telegraph, telephone and electric light pole within the limits of said Borough of Newhope, *the owner or lessee thereof shall pay* to the borough treasurer an annual license fee of one dollar; and *for the maintenance* of each and every mile of telegraph, telephone and electric light wire within the limits of the said borough, *the owner or lessee thereof shall pay* to the borough treasurer FOR THE USE OF SAID BOROUGH an annual license fee of two dollars and fifty cents."

For what specific "use of said borough" are these taxes levied? For what purpose does the ordinance itself *say* they are levied? Is it to cover the cost of *inspection?* Is it to *reimburse* the city for actual or probable expenditure for and on account of the companies affected? The ordinance itself does not say so, directly or indirectly. On the contrary, it declares that when the amount specified shall be paid, as a condition precedent, *such payment "shall authorize the maintenance of the poles and wires designated in the application for the period of one year from that date," and the money shall be for the "use of said borough" generally.*

Is it not a perversion of language—is it not a stretch of judicial prerogative—for the State courts of Pennsylvania to read into this ordinance an intention different from that specifically declared?

So far as electric light companies or local telephone companies are concerned, it is possible that the Borough of Newhope had the right, under its charter, to impose a license tax for the privilege or authority to erect and build electric lines within its limits. *If,*

in the exercise of such possible right, it should undertake to pass an ordinance imposing a privilege tax, what language could it use to express its intention materially different from the language here employed? For the courts to say that the purpose of the ordinance is fundamentally different from the purpose actually expressed, is to rob the worthy burgesses of their vocabulary.

We used to hear such expressions as "*strictissimi juris*" and "proceedings *in invitum*," in connection with tax laws. While these words have become obsolete there is no good reason for going to the other extreme (see Cooley on Taxation, Chap. IX.).

WHEN A TAX IS LEVIED UPON INTERSTATE COMMERCE, OR ITS INSTRUMENTALITIES, THE RULING OF A STATE COURT THEREON HAS NO GREATER SANCTION THAN THE *reasons* GIVEN FOR ITS RULING; THE EFFECT, REASONABLENESS AND VALIDITY OF THE TAX ARE PECULIARLY MATTERS FOR FEDERAL DETERMINATION.

Petitioner's Rights Under the Act of Congress, July 24, 1866.

Considered merely as an ordinary agency of interstate commerce, the petitioner should be exempt from this tax upon its right and authority to maintain its telegraph lines in the Borough of Newhope. *But the petitioner is something more than an agency of interstate commerce;* IT IS PECULIARLY AND EMPHATICALLY AN AGENCY OF THE FEDERAL GOVERNMENT, for it has accepted the burdens, restrictions and obligations of the Act of Congress, July 24th, 1866 (see Record, p. 27, fol. 54).

As is well known, this Act of Congress had its genesis in a suggestion that the Government build its own telegraph lines. Assume that this suggestion had taken definite shape, and that the lines of telegraph here involved were not simply potentially, but actually, the property of the Federal Government; would the tax in question be valid, and would the Federal Government, as a condition precedent to the maintenance of its lines of telegraph in the Borough of Newhope, be under the obligation to pay to that borough each year a dollar for every one of its poles, and two dollars and fifty cents for every mile of wire within the limits of the borough? *If so, could the contiguous borough charge a like amount, and so on and on to the Pacific Coast?*

We venture the opinion that if the Federal Government were obliged to make contribution from its exchequer, at this rate, to all the boroughs and hamlets in the country, the business of government telegraphy would be an expensive experiment. It goes without saying that such municipal exactions would not be tolerated.

But it is evident, not only from the title and context of the Act of July 24, 1866, but from the debates in Congress, that it was the purpose of the Federal Government to give to such telegraph companies as might be induced to accept the burdens, restrictions and obligations of the act, almost as great rights and immunities as the Federal Government itself would have had if its original purposes had been carried out, and the lines of telegraph constructed at Government expense. Indeed, the acceptance of the provisions of this act constitutes the Federal Government potential owner of the properties and effects of the telegraph company, for it

exacts an option for the purchase of such properties and effects at an appraised value. It further requires that the telegraphic communications between the several departments of the Government and its officers and agents shall have priority over all other business. It further provides that the charges for the transmission of governmental messages shall be such as are annually fixed by the Postmaster-General, and by amendment June 10, 1872, denounces penalties of from one hundred dollars to one thousand dollars for each refusal or neglect on the part of the telegraph company to transmit meteorological observations at military stations and other points. May it not be fairly asserted that a telegraph company, thus burdened and obligated, is, in a peculiar degree, the agency of the Federal Government?

If it be conceded that no State or municipality may impose restrictions upon *any* agency of interstate commerce, *a fortiori* may they not burden or condition the right of a telegraph company, accepting the obligations of the Act of July 24, 1866, to occupy the post roads of the United States with its telegraph lines, *so long as the same shall not interfere with the ordinary travel on such post roads.* HERE IS THE ONLY LIMITATION IMPOSED BY THE ACT ITSELF—to wit, non-interference with the ordinary travel on the post roads of the United States (see U. S. Rev. St., Sections 5263 to 5268).

The first section of the act declares: "But such lines of telegraph shall be so constructed *and maintained* as not to * * * interfere with the ordinary travel on such military or post roads." This provision requires that the original construction, not only, but the subsequent maintenance of the lines shall not interfere with such ordinary travel. Hence, the right of such a tele-

graph company under the act of Congress to occupy the post and military roads of the United States depends upon an actual state of facts at any time existing, whether at the time of construction or at any time subsequent thereto.

Surely with a right so limited, a governmental agency so burdened should not be compelled to reimburse itself out of the general public, which it is thus commissioned to serve, for exactions made upon it by every borough of one thousand inhabitants in the United States.

Senator Sherman, of Ohio, who was the special champion of this bill, in answering the question of Senator Nye, of Oregon, as to whether the act would authorize the telegraph company accepting its terms to construct telegraph lines in the United States, wherever they had a mind to do so, replied:

"*Let me ask the Honorable Senator where is the objection to allowing telegraph companies to extend their telegraph lines anywhere in the United States? Would you not like to have them extended to every man's homestead, if it could be done?* WHY NOT?"

And subsequently Senator Sherman declared:

"Any telegraph company organized in a State may run the wires anywhere along the post routes; *they may take them to every man's door if they choose,* IF IT WILL PAY" (see Cong. Globe, Part IV., 1st Session, 39th Congress, pp. 3480 to 3490).

We respectfully submit that Senator Sherman's policy, thus outlined, has been amply justified by the event; for, whereas in 1866 the price of a telegram of ten words from San Francisco to Washington was ten dollars in gold (as frequently asserted in debate), the same service is to-day performed, as may be ascer-

tained at any telegraph office, for one dollar—a reduction of 90 per cent.

Now, the published reports of the Western Union Telegraph Company show that it has in the United States over 200,000 miles of poles with about 35 poles to the mile; that it owns over one million miles of wire. There is not a borough, hamlet or municipal or political subdivision in the United States that is not anxious and eager to relieve its local citizens from the burdens of taxation at the expense of foreign corporations. Is there any peculiarity about the Borough of Newhope, (which, according to the official census, has 1,000 inhabitants), giving it greater rights of taxation than any other village, or hamlet, or county, or township in the United States? If not, then under the ruling in this case every mile of wire owned by the petitioner is subject to a license tax of two dollars and fifty cents each year, and every pole owned by the petitioner is subject to a license tax of one dollar each year, and we have the aggregate of nearly ten millions of dollars license tax—about one and a half times greater tax than the entire net earnings of the company!

We assert *(dehors* the record, to be sure, but as accredited officers of this Court) that the present is only one of eight hundred similar claims *made by eight hundred different municipalities*, chiefly in the State of Pennsylvania, involving ordinances of similar import, and, in some cases, identical in language with the one here involved.

If the doctrine of the State Courts of Pennsylvania is given the approval of the Supreme Court of the United States in this case, we can conceive of no possible defense to these claims, or to any claim of like

character made anywhere in the United States. If, in addition to its general taxes, such license taxes throughout the country, aggregated and combined, would not constitute a grievous burden upon interstate commerce—compelling the petitioner to readjust its tariffs as the burden from time to time increased—then the well-known language of Chief-Justice MARSHALL in *McCulloch vs. Maryland*, 4 Wheaton, 426, and in *Osborne vs. United States Bank*, 9 Wheaton, 737, has lost its significance.

Burden of Proof.

It is contended that, while a municipality has no power to levy a tax upon interstate commerce or its agencies, or an agency of the Federal Government, *for the purposes of revenue*, it may, nevertheless, under its police powers *recoup* itself *for the expense of regulating such agency in the occupation of its streets and the conduct of its business*, and that a license tax imposed for this purpose—to wit, *reimbursement*, is valid *if reasonable*, and that any ordinance passed by a City Council *with the declared object of reimbursement* is *prima facie* reasonable, the burden of proving its *unreasonableness* being upon the person or company affected.

We have already pointed out that the ordinance under consideration does not in terms impose the tax complained of to reimburse it for actual or probable expenditure on behalf of the petitioner, but does expressly declare that the tax is imposed as a condition precedent to a grant of authority to maintain its wires and poles in the Borough of Newhope, and that the

proceeds from the tax are for the use of the borough generally.

We have also suggested, and wish here to emphasize the suggestion, that *money, from whatever source derived, flowing steadily into the coffers of a State or municipality, is "revenue."* If not, what is it? To meet the expenses of administering its government, *safeguarding its citizens*, making its improvements, *and regulating the business and social relations of its inhabitants*, every state, either directly or through its municipalities, levies taxes on *property, franchises* or *occupations*. The moneys so derived are called its revenues. These revenues are created and collected *for the sole purpose of reimbursement* for actual or probable expenditure of some kind, for it is not the part of a State or municipal government to accumulate money beyond its ordinary expenditures.

To say, therefore, that a tax upon property is revenue, that a tax upon franchises is revenue, that a tax upon occupations is revenue, but that a tax by way of indemnity for the regulation of a particular business is *not* revenue, is a solecism; and to say that a tax for "revenue" on interstate commerce or its agencies would be void, but that a tax to reimburse for the expense attending the regulation of such agencies is valid, is, in its essence, the sheerest casuistry.

But what we are now combating is the doctrine that an ordinance, which, on its face or by judicial construction, imposes a tax for the sole purpose of reimbursing for actual or probable expenditure in the regulation of an interstate business, is *prima facie* reasonable.

We earnestly contend that the burden of proof should be upon the city to show the reasonableness of such an ordinance, and for the following reasons:

First. We start with the conceded proposition that interstate commerce and its instrumentalities should be free, unburdened and untrammeled. We add the further proposition that a tax to be paid out of the earnings of a business is, *pro tanto*, a burden on that business, no matter for what purpose the tax may be levied ; *it is the cash payment that constitutes the burden and the euphony of a word does not lighten it.* If, then, a municipality proposes to impose this burden under some doctrine of police regulation, which imposition would be absolutely illegal *unless* reasonable, why should not the municipality, in the very nature of things, be compelled to justify its exaction.

Second. The tax being ostensibly for reimbursement for moneys expended or to be expended to the use of another, and the action for the recovery of the tax being in *assumpsit*, the claim of the municipality is one sounding in contract, and it would certainly violate fundamental principles to permit a person or corporation to sue for money paid, or to be paid, to the use of another, and to throw the burden on the defendant to prove that no such money had ever been expended on his account.

Third. Furthermore, it is a cardinal rule of evidence that if a party to a litigation has within his possession and under his control the best and easiest, or only means to prove a particular fact, he must offer proof of its existence, or judicial presumption will be against him. Now, if a municipality has actually expended money on behalf of another, or if it has incurred liability on behalf of another, it alone best knows that fact, and could easiest offer evidence of it. To say that the petitioner is immune from license tax, *unless such tax is reasonable*, and then as a condition to its

general immunity compel it to prove a negative, to wit, that the particular tax is *un*reasonable, is to graft an extraordinary exception on the rules of evidence.

The Supreme Court of the United States in *City of St. Louis vs. W. U. Tel. Co.*, 148 U. S., 92, had determined that a reasonable charge in the way of rental for property of a city exclusively appropriated to the use of the telegraph company was proper, but the *amount* of the charge was for judicial determination, its reasonableness depending upon the particular facts. On the further hearing of the case before Judge PHILLIPS to enforce the provisions of an ordinance exacting from the telegraph company five dollars a pole, Judge PHILLIPS says (63 Fed. R., 68-73): "Under the decision of the Supreme Court in this case, under the power to regulate, the city may, by ordinance, require the company to pay for the use of such streets. The city in such case is the sole judge of the necessity and wisdom of such an ordinance; and the ordinance *making such requirement* would be *prima facie* reasonable, but as to the amount of the rental, which is the reasonable value of the use and no more, the case is *sui generis; and upon what principle of common right and justice the party demanding the rent should be permitted to establish for itself a prima facie value by adopting the ordinance and throwing the whole burden of establishing its unreasonableness upon the defendant, is not apparent to my mind.* The defendant company is in the city, with its poles and wires on the streets under the paramount authority of an act of the Federal Congress. It comes as a governmental agency in performing an important function in interstate commerce. It neither asks, nor can the city demand, any permit or license to be and remain on such public highway.

It has the right to demand the use of the plaintiff's streets and alleys, and the plaintiff must submit to such use with or without ordinance. But as the defendant occupies public property under the dominion of the city, the city has a right, by ordinance, to demand what? Not such rental therefor as to its legislative body may seem just and proper, but such rental as may represent what is reasonable for the use of the territory appropriated.

"So, while the Court, in this case, said an ordinance like that is *prima facie* reasonable, we are to look at what the learned Justice said later on *as to what extent that reasonableness should go*; for in the final summing up of this question he said:

"'Indeed, it may be observed, in the line of thought heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate company of the streets cannot be denied by the city; that all it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated. And it follows, in the nature of things, that *it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts.*'"

Judge PHILLIPS was here guiding himself by the opinion of this Court, and was seeking to give full force to the doctrines therein announced. His understanding of the opinion of this Honorable Court was, that the ordinance in question was *prima facie* reasonable, in requiring *some* compensation, *but that no presumption whatever attached to the amount of compensation specified.*

The Ordinance and the Evidence.

The ordinance of the Borough of Newhope under consideration ought, we think, to be declared unreasonable and void on account of provisions which it does *not* contain.

For instance, it does not provide that the poles and wires of the various electrical companies named *shall be inspected.*

It does not provide that the borough itself, or any of its officers, *shall do any specific act in connection with such poles and wires.*

It does not provide any officer or department, *whose duty it shall be to inspect poles or wires.*

It prohibits the erection of petitioner's telegraph lines without an ordinance—thereby showing conclusively that it taxes petitioner's *right* to do a telegraphic business.

No distinction is made between the poles and wires of an electric light company and the poles and wires of a telephone or telegraph company, and yet the dangers, and the necessary inspection in consequence of the dangers, in the use of a telegraph wire are very different from the dangers attending the use of an electric light wire, and the rules of law pertaining to the use of each are also very different.

Possibly a municipality would be justified in permitting wild animals to be kept on the premises of the owner, or a powder magazine to be erected on its outskirts, or electric light currents of electricity to be carried along its streets ; but, surely, a license tax for the regulation and control of these ought to be differ

ent in amount from the tax imposed on the keeper of "a harmless necessary cat," or the manufacturer of baking powder, or a telegraph or telephone company. For the dangers are different; the rules governing the use of the properties are different; the amount of care, inspection, surveillance, is different, and an ordinance taxing them all alike would, therefore, be unreasonable and unjust.

The evidence in the case shows that the ordinance of the Borough of Newhope under consideration had been in operation four years at the time of the bringing of this suit.

The evidence shows that during the *first* year no officer of the Borough of Newhope ever inspected the wires or poles of the petitioner, and that the borough itself had incurred no expense whatever in relation thereto.

The evidence shows that during the *second* year no officer of the Borough of Newhope ever inspected the wires and poles of the petitioner, and that the borough itself was at no expense whatever in relation thereto.

The evidence shows that during the *third* year no officer of the Borough of Newhope ever inspected the poles and wires of the petitioner, nor was the borough itself at any expense whatever in relation thereto.

The evidence shows that during the *fourth* year no officer of the Borough of Newhope ever inspected the wires and poles of the petitioner, nor was the borough itself at any expense whatever in relation thereto.

If the petitioner had paid the taxes levied for these four years, what would have become of the money? One thing certain, it would not have been applied to reimburse the Borough of Newhope for any expenditure on behalf of the petitioner, for there was none.

To be sure, a Pennsylvania case, cited with seeming approval by this Court, says that the fact that a municipality was at no expense for inspection during the current year for which the tax was levied, is not conclusive as to the unreasonableness of the tax. Is it equally inconclusive when it is shown that the municipality has been at no expense for the first, and second, and third, and fourth year, inclusive? Must the petitioner pay for inspection, not because any officer of the Borough of Newhope has ever inspected, but because at some indefinite future time he is just as like as not to do so? Or shall the Borough of Newhope, under the guise of a license tax and a police power, be permitted to accumulate an insurance fund against some possible conjectural liability? Is this doctrine, for instance, announced in *Chester City vs. Western Union Tel. Co.*, 154 Pa., 464, to become the law of the land for the taxation of interstate commerce and its instrumentalities?

"It is the duty of the city," say the Court, "to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the negligence of such duty an action might lie against the city for the consequences of such neglect. *It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year to the particular purposes specified in the affidavit.*"

Or, this, for instance, from the case of *Philadelphia vs. American Union Tel. Co.*, 167 Pa., 406, where the Court say:

"*Not only the cost of regulating the poles and wires and issuing licenses therefor and of the ordinary and*

necessary expenses imposed upon the city of Philadelphia thereby, but also all extraordinary expenses of the said city of Philadelphia, or its municipal officers, or damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damage, loss, injury and expenses of every nature whatsoever."

Is not the foregoing a somewhat startling, not to say alarming, amplification of the pristine limitation of a license tax under the police powers of a city?

Hitherto it has been the accepted opinion among lawyers that a license tax should be limited to the actual cost of issuing the license (see *Welsh vs. Hotchkiss*, 39 Conn., 143; Cooley Const. Lim., Ed. 1886, p. 242), but under the doctrine of the Pennsylvania Courts, seemingly approved by your Honors in this case, the reasonableness of the tax imposed under a license ordinance is to be determined, not by the cost of issuing the license, not by the actual expense of inspection, but also by the "damages arising from liability imposed upon the city by the erection and maintenance of said poles and wires, and all other costs and damages, liability for damages, loss, injury and expenses of every nature whatsoever."

Under this doctrine, why should not the Borough of Newhope have levied a tax on petitioner's property of ten dollars a pole and twenty dollars a mile for wire? How could petitioner prove the unreasonableness of such a tax? What Judge or jury is gifted with a clairvoyance capable of forseeing the remote speculative damages and liability, to cover which the tax is imposed?

In *Ford vs. Standard Oil Company* (32 Hun, 596),

an ordinance of the City of Auburn, in the State of New York, created the office of oil inspector, and provided further that his fees for services of inspection should be one-half cent a gallon, to be recovered from the owner of the property inspected. It was proven that the market price of oil was six cents a gallon, consequently the inspection charge of one-half a cent a gallon amounted to eight and one-half per cent. of the value of the property inspected. The Court held that the ordinance was illegal and void: (1) *because no restrictions were imposed on the inspector or rules established regulating his conduct, and (2) because the fee fixed was excessive, being eight and one-half per cent. of the property inspected.*

In the case at bar there is not only failure to create the office of inspector, or any department charged with the duty of doing anything with relation to petitioner's property, *but the tax on petitioner's poles is equal to thirty-three and one-third per cent. of the cost of the poles and from eight to twelve per cent. of the cost of the wire, dependent on whether it is of iron or copper.*

In the *City of Saginaw vs. Swift & Co.*, 72 N. W., 6, an ordinance to regulate the putting up, taking down, maintaining and repairing telegraph, telephone and electric light poles and wires, provided that "the City of Saginaw shall cause all poles used and maintained and kept by any person, company or corporation for stringing or sustaining his or its electrical wires or cables in said city, *to be inspected once a year to ascertain whether the same are secure and maintained in accordance with this ordinance of said city, and such person, company or corporation shall pay to said city for such inspection the sum of fifty cents per annum for*

each pole so maintained by him or it." It will be observed that this *did* provide for inspection; not only so, but the poles of the defendant company *were actually inspected*, and, as the proof showed, at a cost of not more than five cents a pole.

The Court say:

"While we think it is proper for the city to make a reasonable inspection, and we are not prepared to say that this is not reasonable, there is no occasion for requiring the electric company to pay more than a sum sufficient to pay the reasonable cost of such inspection. The pole is in plain sight, may be easily ascended, if necessary, and an examination as to soundness below the surface cannot be difficult or expensive. * * * The company has a right to exist and do business by virtue of the statute. It depends upon the city only for its right to lay, construct and maintain its conduits for electricity through streets, etc. This consent was given by resolution of May 9, 1881, the only qualification being that the poles should be erected under the supervision of the street commissioner. * * * The consent contemplated by the statute was given, and the defendant had a right to erect its poles and carry on its business, subject to the right of the city under the statute to prescribe reasonable regulations. As already stated, we consider this an unreasonable one."

This, we submit, is the true exposition of the law relating to a license tax *where a municipality is empowered to impose such tax.* The doctrine of the State Courts of Pennsylvania is not only novel, but dangerous; for it permits a municipality, under the guise of a license tax, which in theory should be a bagatelle, to reimburse it for the cost of issuing a license, to levy a

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tax in comparison with which all other taxes, aggregated and combined, amount to nothing.

The whole question involved in this case can be summed up in a single sentence. *Is a tax on petitioner's property, amounting to from eight to thirty-three per cent. of the actual cost and value of the property taxed, and which, if applied to its entire property subject to such exaction, would more than absorb its entire net earnings, for no specific regulation, and to reimburse for no actual expenditure on its behalf, such a burden as amounts to a regulation of interstate commerce, and a special agency of the Federal Government?*

It seems to us that on more thorough consideration this question can be answered only in the affirmative.

May we, in closing, venture to ask your Honors whether, had this been an appeal by the Borough of Newhope from a judgment of the State Court pronouncing the ordinance in question unreasonable and, therefore, an illegal restraint upon interstate commerce, your Honors would have affirmed such a decision? If so, would there not be involved in the admission, the tacit acknowledgment that each State has the right to determine for itself whether an ordinance of one of its municipalities is or is not a restraint upon interstate commerce, and a contravention of the Federal Constitution? And could such a right in the State result in anything but discord and uncertainty?

We respectfully insist that it is the duty of this Court, wholly untrammeled by State decisions, to determine:

FIRST. Whether or not every municipality has the right to impose a tax upon interstate commerce or its instrumentalities, or upon a telegraph company which

has accepted the provisions of the Act of Congress, July 24, 1866.

SECOND. If so, to outline the rationale of such a municipal tax and indicate generally the limitations of the power.

Respectfully submitted,

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